NO.

in the Supreme Court of the United States

LARRY W. BURDGICK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEALS FOR FLORIDA

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18 pp

QUESTIONS PRESENTED

Whether evidence that resulted from an illegal arrest of the Petitioner was improperly admitted at trial.

Whether Florida Statute 856.021 is unconstitutionally vague in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

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TABLE OF CITATIONS

NO.

in the Supreme Court of the United States

LARRY W. BURDGICK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL FOR FLORIDA

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Fourth District Court of Appeal for Florida entered in the above-styled case on March 21, 1984, rehearing denied April 13, 1984.

OPINION BELOW

The opinion of the Fourth District Court of Appeal for Florida is not reported and is printed in the appendix.

JURISDICTION

The judgment of the Fourth District Court of Appeal for Florida was entered on March 21, 1984, rehearing denied April 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT OF THE CASE

The Petitioner, Larry W. Burdgick, and others, were charged by information with trafficking in Methaqualone. The trial court denied defendants' Motion to Suppress Evidence. Upon specifically reserving the right of appellate review on said issue, the Petitioner, Larry W. Burdgick, pled nolo contendere to attempted trafficking in excess of 25 kilograms of Methaqualone and was sentenced to a term of ten years. Said conviction and sentence was affirmed by the Fourth District Court of Appeal of Florida on March 21, 1984, rehearing denied April 13, 1984. This Petition for Writ of Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

At the hearing on the Motion to Suppress, Henry Devlin of the Port St. Lucie Police Department testified that on January 7, 1981 at 9:15 p.m., while off duty, he and his father observed a van and another vehicle parked by the side of the road in an unoccupied section of Port St. Lucie. Devlin testified that area police had

previously received information regarding the possible slaughtering of cattle taking place in the general vicinity, but that there were no cows in the area of the observed vehicles. In fact, Devlin admitted that there were no homes or residents in the area, and that he did not observe the suspects violating any laws.

Charles Sutton of the Port St. Lucie Police Department testified that Devlin contacted him and told him that there was suspicious activity, even though there were no houses, apartments or parks in this uninhabited area. Sutton approached the suspects, identified himself, and demanded the suspects to converge in the center of the road. Co-defendants John Manter and Charles Longwell appeared to ignore this request until Longwell first walked over to the weeded area by the side of the road.

All the suspects were frisked for weapons; none were found. Officer Sutton proceeded to the weeded area and found ground aircraft trans-receiver with an antenna and microphone. He also found inside a bag a .25 caliber gun and five strobe lights. A search of the van revealed a plastic container, a clear plastic hose, another trans-receiver, and walkie-talkie type radios. The defendants were arrested at this time upon a charge of loitering and prowling.

At 10:40 p.m. Officer Sutton heard an aircraft flying South. Within minutes, the aircraft was heard again. Using the trans-receiver to contact the plane, Officer Sutton, in an undercover capacity, directed the plane to land. A subsequent search revealed Methaqualone on board.

ARGUMENT

ISSUE I

EVIDENCE THAT RESULTED FROM AN ILLEGAL ARREST OF THE PETITIONER WAS IMPROPERLY ADMITTED AT TRIAL.

An hour and fourteen minutes had elapsed between the time the defendants were originally observed and ultimately arrested. Officer Sutton had the defendants detained on the ground for an additional hour before the aircraft landed at the direction of law enforcement officials. Although no crime had been committed in the officers' presence, the officers had their guns drawn and had placed the defendants lying in the street before any questions were asked of them.

After placing all the defendants on the ground, officers read them their *Miranda* rights. When subsequently asked what they were doing, the defendants did not answer, merely producing their drivers' licenses and identification. The defendants were then arrested for loitering and prowling in the rural area in violation of Florida Statute 856.021. The area in which the defendants were arrested was uninhabited, without buildings or livestock.

The Supreme Court of Florida, in *State v. Ecker*, 311 So.2d 104 (Fla. 1975) concluded that police officers do not have unbridled discretion to arrest whenever they please under the color of Florida Statute 856.021. The loitering and prowling statute is not designed to be used as a "catch all" provision so that citizens may be detained, when there is an insufficient basis to sustain

a conviction on some other charge. *B.A.A. v. State*, 356 So.2d 304 (Fla. 1978).

Florida Statute 856.021 requires that the following elements of a crime be present:

> 1. That the defendant loiter or prowl in a place, at a time, or in a manner not usual for law-abiding individuals.
>
> 2. Such loitering and prowling were under circumstances that warrant justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

Under the facts of the present case, there was no testimony that the defendants were near buildings, on private property, or near any persons in the vicinity. Furthermore, although one stated reason for the police officers' actions was their suspicion of criminal activity, such as the theft of livestock, the officers acknowledged that there was, in fact, no livestock in the vicinity.

The Florida Supreme Court in *State v. Ecker*, *supra*, held that an arrest pursuant to Florida Statute 856.021 must be justified upon specific and articulable facts upon which a finding can be made that a breach of the peace is imminent or that the public safety is threatened. The testimony at the suppression hearing is clear that none of the defendants fled and that they presented credible and reliable identification. Furthermore, from the initial observation to the time the defendants were placed under arrest, the officers observed nothing which would constitute an illegal act.

In the present case, the facts clearly demonstrate that the defendants were placed under arrest without the requisite probable cause. It is well settled that suspects can be in *de facto* custody, even though not formally arrested. *Dunaway v. New York*, 422 U.S. 200 (1979).

The defendants herein were held for over two hours, having been placed face down in the street under the drawn guns of the police. It is permissible to detain suspects only for a "reasonable time" to investigate the circumstances warranting the investigatory stop. The time that the defendants were detained could not be considered "reasonable" under this set of circumstances.

If there were not sufficient grounds to find probable cause upon which to detain or arrest the defendants for loitering and prowling, the defendants were thus arrested solely as a "means employed by the police to discover evidence to further connect" the defendants with an offense. *Mills v. Wainwright*, 415 F.2d 787 (5th Cir. 1969).

In *Mills*, the Fifth Circuit Court of Appeals reversed the defendant's conviction in the Florida State Courts based upon the conclusion that the defendant's arrest for vagrancy was illegal and unrelated to any offense upon which there was probable cause to take the defendant into custody.

> In fact, it was while Mills was being detained on the vagrancy offense that fingerprints were taken that connected him with the crime of

which he was later convicted. There is no question that the vagrancy arrest was a sham.

Thus, the Petitioner's initial arrest for loitering and prowling was a mere sham, an investigatory tactic used to further connect him to other suspected crimes not yet based upon either articulable suspicion or probable cause. Under the dictate of *Mills*, the evidence emanating from this illegal detention must be suppressed.

In addition to the suppression of physical evidence, the previously unknown identity of the Petitioner would also be suppressible. The Court in *United States v. Chamberlain*, 609 F.2d 1318 (9th Cir. 1979), recognized that the identification of the defendant could be a fruit of police illegal activity and thus subject to the exclusionary rule. By analogy, fingerprints, like the Petitioner's identification, would be suppressed if taken from the defendant during the course of an illegal stop and detention.

Since law enforcement authorities lacked probable cause upon which to arrest the Petitioner for loitering and prowling, and lacked probable cause upon which to base any other arrest, the evidence obtained as a result of Petitioner's illegal arrest, including his identity, should have been suppressed.

ISSUE II

FLORIDA STATUTE 856.021 IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Petitioner was arrested pursuant to Florida Statute 856.021. However, the recent decision of this Court in *Kolender v. Lawson*, ____ U.S. ____, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) would render Florida Statute 856.021 unconstitutionally vague on its face. The California statute considered in *Kolender* contained no standard for determining what a "credible and reliable" identification was as required to be provided by the suspect when approached by law enforcement officers under California Penal Code §647(e) and *People v. Solomon*, 33 Cal. App. 3rd 429 (1973).

Similarly, the Florida Supreme Court in *State v. Ecker, supra*, has construed Florida Statute 856.021 to require a suspect to produce "credible and reliable" identification when confronted by a law enforcement officer, as well as "a reasonable explanation" with which to alleviate the law enforcemcnt officer's concern for the public safety.

This Court held in *Kolender* that the standard of "credible and reliable" identification was unconstitutionally vague since, it "encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute". Thus, without a set and articulated standard, "the statute rests virtually complete discretion in the hands of the

police to determine whether the suspect has satisfied the statute. . . ."

The Petitioner would respectfully submit that Florida Statute 856.021, like California Penal Code §647(e), is unconstitutionally vague inasmuch as it gives the police no governing standard for determining whether the suspect has satisfied the statute. Nowhere in the Florida Statute or case law is there any articulable guidance on what grounds the officers should use in determining whether the suspect's "explanation" is "believable" or not, or whether the identification presented to the officers is "reliable" or "credible".

If this Court finds that the arrest of the Petitioner was made pursuant to an illegal and unconstitutional statute, then all evidence flowing from said illegal detention should have been suppressed.

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its order quashing the decision hereby sought to be reviewed, and grant such other and further relief as seems right and appropriate to this court.

Respectfully submitted,

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Appendix

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 83-573, 83-653,
83-654, 83-859.

CHARLES A. LONGWELL, et al.,

Appellant,

v.

STATE OF FLORIDA

Appellee.

April 13, 1984

BY ORDER OF THE COURT:

ORDERED that Appellants' March 28, 1984 Motion for Rehearing is denied.

I hereby certify the foregoing is a
true copy of the original court order.

CLYDE L. HEATH,
CLERK

cc: Ronald A. Dion, Esq.
James P. McLane, Assistant Attorney General

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA FOURTH DISTRICT

JANUARY TERM 1984

CASE NOS. 83-573, 83-653,
83-654, 83-859.

CHARLES A. LONGWELL,
LARRY WAYNE BURDGICK,
PAUL EDWARD FREIDLING,
JOHN COLE MANTER,

Appellants,

v.

STATE OF FLORIDA,

Appellee.

Decision filed March 21, 1984

Consolidated appeals from the
Circuit Court for St. Lucie
County: Royce R. Lewis, Judge.

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Schwartz, Dion & Sclafani,
North Miami Beach, for appellants.

Jim Smith, Attorney General,
Tallahassee, and James P. McLane,
Assistant Attorney General, West
Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

ANSTEAD, C.J., LETTS and GLICKSTEIN, JJ., concur.

(3)

CASE NO. 83-2089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LARRY W. BURDGICK,
Petitioner,
STATE OF FLORIDA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT.

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QUESTIONS PRESENTED

WHETHER THE SUPPRESSION OF EVIDENCE WAS PROPERLY DENIED, AND WHETHER THIS ISSUE PRESENTS A SUBSTANTIAL FEDERAL QUESTION?

WHETHER FLORIDA'S LOITERING STATUTE IS UNCONSTITUTIONALLY VAGUE?

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STATUTES

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the facts to the extent that it presents an accurate, non-argumentative recitation of proceedings in the state trial court, with the following additions and/or clarifications. (References will be made to the transcript of the hearing on the motion to suppress using the symbol "T.")

Officer Henry E. Devlin testified that the Port St. Lucie police had had conferences within the department concerning the unoccupied area west of town being used as a landing strip for airplanes and as a delivery point for narcotics into the country (T 11, 12-13). He explained that there was a painted circle in the middle of the intersection of Parr Drive and Port St. Lucie Boulevard which could be observed from

the air and was used as a landmark (T 11-12). It was in this area that he saw the vehicles and the people on the night of January 7, 1981 at approximately 9:15 p.m. (T 13-14). There had also been reports of cattle slaughtering, cattle theft and property damage in that area (T 17-18). On a prior occasion Devlin had been called to that area as a backup to another officer who had found flashlights placed in the center of the road which were being used to guide in a plane (T 23-24). After he saw the people and the vehicles on the night of January 7, 1981, Devlin alerted other officers on a scrambler channel of a police radio; the scrambler channel was used because of the possibility of drug smuggling (T 16-17).

Port St. Lucie police officer Charles Sutton received the call from Devlin

(T 30). Sutton testified that the circle area had been identified as a possible cite for drug trafficking by either air or land (T 29). As he approached the area, he could see a van, an automobile and the four defendants (T 32-34). Sutton stood by his marked police vehicle, identified himself as an officer (T 34) and asked the men to come to the center of the road (T 35) since he was alone at the time and wanted to find out what they were doing in that area at that time (T 80). Two of the men ignored his request. One of them walked twice to the side of the road and placed something in the weeds, and the other remained at the rear of the van, apparently attempting to conceal himself or items unknown to Sutton at the time, and eventually came forward very hesitantly only when ordered to do

so (T 38-39, 78-79).

Officer Sutton asked the men individually and as a group what they were doing in the area, and none of them responded (T 42, 71). Sutton then went to the weeded area where he found an air to ground aircraft transceiver with an antenna and a microphone attached to it, five strobe lights, and a twenty-five caliber automatic pistol (T 42-43). Sutton also saw another transceiver and several walkie-talkie radios on the floor of the van (T 45-46). Based on his training and experience, his knowledge of the circle area, and the items which he found, Sutton believed that the men were planning to contact something in the air from that location (T 43-44).

Sutton then arrested all four men for loitering and prowling (T 47-48). Another officer arrived and assisted in

advising all of the defendants of their rights (T 46). The officers remained in the area with the four defendants, and approximately one hour and ten minutes after Sutton first encountered them (T 57), he heard a low-flying plane approach (T 48). Sutton gave the pilot landing instructions using the transceiver (T 51). The persons inside the plane were never apprehended, but over 1,000 pounds of methaqualone tablets were found inside the plane (T 52).

REASONS FOR DENYING THE WRIT

I

THE SUPPRESSION OF EVIDENCE WAS PROPERLY DENIED, AND THIS ISSUE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Petitioner argues that his arrest for loitering and prowling was illegal, and that any evidence derived therefrom should have been suppressed. In his statement of the issue, he inadvertently implies that the evidence was admitted at trial. Of course, since petitioner pled nolo contendere, there was no trial. At any rate, respondent maintains that the facts of this case support the validity of the arrest and the denial of suppression.

The constitutionality of Florida's loitering statute was upheld by the Florida Supreme Court in State v. Ecker, 311 So.2d 104 (Fla.), cert.denied sub nom. Bell v. Florida, 423 U.S. 1019

(1975). The version of the statute construed in Ecker, § 856.021, Fla.Stat. (1973), is identical in number and language to the statute in effect at the time suppression was sought in the instant case, and remains unchanged today. See § 856.021, Fla.Stat. (1979 and 1983). The court in Ecker noted that the statute had been patterned after the Model Penal Code and that the question of its constitutionality "requires a delicate balancing between the protection of the rights of individuals and the protection of individual citizens from imminent criminal danger to their persons or property." Id. at 107.

The court rejected a challenge to the statute based on vagueness and overbreadth, borrowing the words of this Court in Terry v. Ohio, 392 U.S. 1, 21 (1968), by specifying that "'the police

officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' a finding that a breach of the peace is imminent or the public safety is threatened" in order to justify an arrest for the offense of loitering. Id. at 109. The requisite facts and inferences were clearly present in the instant case.

The statute states that it is "unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity." The statute also lists among the circumstances which may be considered in determining whether

such alarm is warranted the fact that the person "manifestly endeavors to conceal himself or any object." § 856.021 (1) & (2). In the instant case, both Officers Devlin and Sutton testified that the area where they encountered petitioner was an unoccupied, rural area which was a suspected landing site for planes involved in drug trafficking. The police had also had reports of cattle slaughtering and theft, and property damage in the same area. The defendants in this case were found at 9:30 p.m. with two vehicles in a remote area. At the beginning of the encounter, one of the men ignored the officer's request to come to the center of the road, and instead walked two times to hide items in a weeded area along the side of the road. Another of the men also ignored the officer, and appeared to be attempting

to conceal objects inside the van. In the course of the encounter, Officer Sutton determined that the concealed items were transceivers, strobe lights, walkie-talkie radios and a twenty-five caliber automatic pistol. In light of his experience and the police knowledge of the use of the area for drug trafficking, petitioner cannot credibly argue that Officer Sutton could not point to specific and articulable facts which reasonably warranted his alarm. Perhaps that is why petitioner does not address all of the facts in his argument.

Petitioner also alleges in his brief that the defendants "were held for over two hours, having been placed face down in the street under the drawn guns of the police." Here again, the facts do not support petitioner. Officer Sutton arrived at the scene at 9:30 or 9:35 p.m.

(T 56), and the arrests occurred at 10:33 p.m. (T 54). The plane landed approximately one hour and ten minutes after Sutton's arrival at the scene (T 57). Part of that time was spent gathering the defendants after two of them ignored the officer's request to come to the center of the road, and surveying the scene, during which the transceivers and other items were seen in plain view in the weeded area along the side of the road and through the windows of the van (T 118-119). In short, respondent maintains that the facts of this case do not support petitioner's claim of illegality, and therefore, the issue presented here does not pose a substantial federal question.

II

FLORIDA'S LOITERING STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioner argues that § 856.021 is unconstitutionally vague in light of this Court's recent opinion in Kolender v. Lawson, ___ U.S. ___, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Respondent disagrees. A review of the Florida statute (set forth in the appendix to this brief) in comparison with the California statute at issue in Kolender, 75 L.Ed.2d at 906 n.1, will demonstrate that the Florida statute is considerably more detailed than the California statute.

Furthermore, respondent respectfully maintains that disposition of this issue by this Court is premature. In Watts v. State, 447 So.2d 271 (Fla. 2nd DCA 1983), the Second District Court of Appeal of Florida rejected a challenge to the facial constitutionality of § 856.021 which was predicated on this Court's decision in Kolender. The appellate

court held that while some of the reasoning relied upon in State v. Ecker, supra, has been disapproved in Kolender, the Florida statute "is so much more definitive than the California statute as to render the result in Ecker still valid." Id. at 272. For example, the Florida statute applies to persons loitering or prowling "in a place, at a time or in a manner not usual for law-abiding individuals...," while the California statute applied to every person who "loiters or wanders upon the streets or from place to place without apparent reason or business...."

After the second district's decision in Watts, the defendant in that case successfully requested review by the Florida Supreme Court pursuant to a provision of the Florida appellate rules which allows the court to assume discre-

tionary jurisdiction to review decisions of district courts of appeal which expressly declare valid a state statute. See Fla.R.App.P. 9.030(a)(2)(A)(i). The issue now pending in that case, Watts v. State, FSC Case No. 64,613, is exactly the same issue as that raised here, that is, whether § 856.021 is facially unconstitutional in light of this Court's opinion in Kolender v. Lawson. Oral argument was heard in that case on September 4, 1984. Thus, the Florida Supreme Court will soon be answering the same question now presented to this Court.

In Kolender, this Court emphasized that a facial challenge to a state statute is evaluated in light of any limiting construction that a state court has proffered. 75 L.Ed.2d at 908. Thus, while respondent respectfully maintains that this Court should deny the writ on the

ground raised here, if the Court is nevertheless disposed to entertain the issue, it should not do so at this time. State v. Ecker was decided by the Florida Supreme Court in 1975, and this Court denied certiorari review that same year. If the Kolender case occasions a reevaluation of the statute's constitutionality, that reevaluation should take place first in the Florida Supreme Court in the Watts case. If the statute does not survive that proceeding, this case can be returned to the Fourth District Court of Appeal for redetermination in light of Kolender and the Florida Supreme Court's opinion. If the Florida Supreme Court re-affirms the statute's constitutionality, then its opinion will become the authoritative one for purposes of defining the meaning of § 856.021, and petitioner's juris-

dictional claim can be determined in light of that opinion. See 75 L.Ed.2d at 908 n.4.

For these reasons, along with this brief respondent is requesting by separate motion that if the writ is not denied at this time, consideration of the instant petition should be deferred pending the Florida Supreme Court's decision in the Watts case.

CONCLUSION

For these reasons, respondent respectfully requests that the instant Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District, be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

§ 856.021, Fla.Stat. (1979) Loitering or prowling; penalty.-

(1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

(2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstance makes it impracticable, a law enforcement officer shall, prior to any

arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

(3) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.